87-222

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRED SILVER,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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QUESTIONS PRESENTED

I.

Whether the trial court erred in failing to quash a search warrant issued for the search of the petitioner and his residence and failed to suppress the evidence recovered upon the execution of the search warrant where that warrant failed on its face to establish probable cause for its issuance.

(a)

Whether the issuing judge was neutral and detached when he improperly considered the complaint for search warrant simultaneously with the application for judicial approval to record conversations.

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In The

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FRED SILVER,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

The petitioner, Fred Silver, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of Illinois, First District entered in this proceeding on December 24, 1986.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District is reported at 151 Ill.App.3d 156, 502 N.E.2d 1141, 104 Ill.Dec. 481 (1st Dist. 1986) (Appendix 1a-8a).

JURISDICTION

The judgment of the Appellate Court of Illinois, First District was entered on December 24, 1986 (Appendix 1a-8a), and a timely petition for rehearing was filed and was denied on January 23, 1987 (Appendix 9a). A timely petition for leave to appeal was filed in the Supreme Court of Illinois and was denied under Docket No. 64876 on June 4, 1987 (Appendix 10a). This petition for a writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioner, Fred Silver, was charged by indictment in the Circuit Court of Cook County, Illinois with possession of a controlled substance, to wit: cocaine and the delivery of controlled substance, also cocaine.

Prior to trial, the petitioner filed pretrial motions challenging the admissibility of certain evidence as well as motions challenging the probable cause for the issuance of a search warrant for the search of his person and for his residence.

The motion to quash the search warrant which was issued on February 9, 1982, was heard by the trial court. The search warrant and complaint for search warrant are reproduced in the Appendix. The motion to quash the search warrant, alleging the lack of probable cause for its issuance, raised the Fourth Amendment grounds at the trial court level. (R.C 69-70, 85-86) The trial court denied the motion to quash the search warrant. (R. 431) The validity of the search warrant was preserved for appellate review by a post trial motion. (R.C 126-128) The Appellate Court of Illinois affirmed the trial court's ruling. (App. 8a)

The petitioner alleged at trial and on appeal that the search warrant was invalid on its face for failing to satisfactorily establish facts that a crime has been or is about to be committed. The petitioner claimed that the search warrant did not show a fair probability that evidence of a crime would be found on the person of or in the residence of the petitioner.

The petitioner in a pretrial motion alleged that the judge that issued the search warrant on February 9, 1982, committed error when he issued the search warrant mentioned above while at the same time that judge considered an application for judicial approval to record conversations of the petitioner. The respondent and petitioner stipulated that the issuing judge considered simultaneously the complaint for search warrant at the same time he considered the application to overhear and considered them at the same time he approved each. (R.C 10, R. 501)

The Appellate Court of Illinois affirmed the trial court's denial of this pretrial motion finding that the complaint for search warrant and the Petition for Judicial Approval "were virtually the same." (App. 7a)

The trial court heard evidence relating to pretrial motions which issues are not raised in this petition. At a trial without jury, the petitioner and respondent entered into stipulations concerning the evidence to be heard at trial. The petitioner was found guilty of delivery of controlled substance and possession of controlled substance with intent to deliver. He was sentenced to six years imprisonment in the Illinois Department of Corrections. (R. 525)

REASONS FOR GRANTING THE PETITION

I.

THE SEARCH WARRANT ISSUED FOR THE SEARCH OF THE PETITIONER AND HIS RESIDENCE FAILED ON ITS FACE TO ESTABLISH PROBABLE CAUSE FOR ITS ISSUANCE. THE TRIAL COURT ERRED WHEN IT FAILED TO QUASH THAT WARRANT AND FAILED TO SUPPRESS EVIDENCE RECOVERED UPON THE EXECUTION OF THAT FATALLY DEFECTIVE WARRANT.

This Court should grant the writ of certiorari in this case in order to reaffirm the necessity of the presence of probable cause before a judge permits the issuance of a search warrant. The Fourth Amendment to the United States Constitution provides for the security of an individual's person and residence against unreasonable searches and that a search warrant must be supported by probable cause before its issuance.

This case is an opportunity to address the important and recurring question regarding the necessity of probable cause as a prerequisite for the issuance of a search warrant.

This Court in *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983), provided that an issuing magistrate's determination of probable cause "should be paid great deference by reviewing courts." 462 U.S. at 236. However, this deference still requires that the issuing magistrate find that the affidavit shows a "fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. at 237-238.

A reviewing court must determine that there is "substantial evidence" supporting the issuing judge's decision to issue a warrant. *Massachusetts v. Upton*, 466 U.S. 727, 728, 80 L.Ed.2d 721, 104 S.Ct. 2085 (1984). While giving deference to an issuing magistrate's determination of probable cause, that deference should not be "boundless." *United States v. Leon*, 468 U.S. 897, 914, 82 L.Ed.2d 677, 104 S.Ct. 3405 (1984). Thus as this Court said in *United States v. Leon, supra*:

> "Even if the warrant application was supported by more than a 'bare bones' affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances. . . ." (citation omitted) 468 U.S. at 915.

The Appellate Court of Illinois in the instant case improperly applied the "totality of circumstances" test to this warrant as announced in *Illinois v. Gates, supra.* Even applying the *Gates* totality of circumstances rule the affidavit for search warrant did not show a fair probability

that evidence of a crime would be found on the person of and in the residence of the petitioner.

The affidavit for search warrant does not state that the affiant ever saw the petitioner deliver cocaine or that cocaine was ever seen in the petitioner's residence. Even though his residence was under surveillance, there is nothing in the affidavit that police officers ever saw any drugs being delivered or that the petitioner ever received any money for the delivery of any drugs.

In all the observations as set forth by the affiant, there are none that would lead to a common sense conclusion that there was any criminal conduct involving the petitioner. In all the activities set forth where the petitioner was being observed, there was no observation of any delivery of any kind.

The Appellate Court of Illinois, as well as the trial court, erred when it placed reliance on the statement in the affidavit that an unnamed confidential source said Scott Prisant's source of cocaine was Fred Silver. (App. 5a) The trial court erroneously determined that Scott Prisant was the confidential informant. (R. 426) This was factually impossible because Prisant did not know prior to February 9, 1982, that he was selling cocaine to undercover law enforcement officers. Prisant had never told Agent Kaysen the name of his source nor did Prisant provide any reliable information prior to February 9, 1982, that Fred Silver was his source. Therefore, it is factually impossible and clearly erroneous for the trial court and the Appellate Court of Illinois to determine that Scott Prisant was the confidential informant identified in the affidavit for search warrant. He could not have been this informant even assuming such an informant ever existed.

There is no legal basis to determine that this unsupported allegation was reliable. Mere conclusory allegations of an informant, without factual support, do not provide issuing judges with enough information upon which to make an independent determination of the conclusions set forth in the affidavit.

Over and above the absence of factual support of the hearsay statements of the so-called confidential informant, the veracity of this individual is not set forth in the affidavit. Merely claiming the informant had given information within six months which had resulted in three recoveries of drugs does not provide sufficient detail about them to satisfy the longstanding legal requirement that the information in this case is reliable. See, *Aguillar v. Texas*, 378 U.S. 108, 114, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964) and *Spinelli v. United States*, 393 U.S. 410, 416, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969). There was no factual showing of the informant's prior reliability and basis of knowledge of this information. No issuing judge could or should have given credence to the alleged hearsay statement of the unnamed confidential informant's statement.

Taking into account the totality of the circumstances, the search warrant did not show a fair probability that evidence of a crime would be found on the person of or in the residence of the petitioner. The actions set forth in the affidavit relating to the petitioner are totally innocent of any wrongdoing. The search warrant lacked probable cause for its issuance and should have been quashed.

(a)

The Judge Who Issued The Search Warrant Was Not Neutral And Detached When He Considered The Complaint For Search Warrant Simultaneously With The Application For Judicial Approval To Record Conversations.

It was stipulated at the petitioner's trial that the judge who issued the search warrant (R.C 10) and gave judicial approval under Illinois law to record conversations of the petitioner (Supp. R.C 2-7) signed the search warrant and the consent to overhear at the same time. It was also stipulated that the judge was presented with the complaint for search warrant and the application to overhear simultaneously and that he considered them at the same time as he approved each. (R. 501)

This simultaneous approval procedure was improper. The search warrant should have been issued by a judicial officer who is "neutral and detached." *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674, 2680 (1978). The issuing judge was not neutral or detached when he gave approval to the search warrant. He had before him the contents of an application for judicial approval to record conversations. While there were similarities between the complaint for search warrant and the application for judicial approval, the statements contained in each are not identical. The application for judicial approval states that the three previous applications involving the petitioner were attached and incorporated by reference to the application of February 9, 1982. (Supp. R.C 2) Therefore, the judge had occasion to consider those documents when he was to determine if there was probable cause to issue the search warrant.

The validity of the search warrant depends on the sufficiency of what is found on the face of the underlying

complaint or affidavit. *United States v. Taylor*, 716 F.2d 701, 705 (9th Cir. 1983). Here the judge had both the application for judicial approval and the complaint for search warrant before him. He considered more than the contents of the complaint for search warrant in determining whether probable cause was shown for its issuance.

The petitioner is entitled to the issuing judge making an independent judgment of the sufficiency of the complaint for search warrant without considering matters not on the face of the complaint. By simultaneously considering both documents and taking into account matters not on the face of the complaint, the issuing judge exceeded his judicial authority to make an independent analysis of the content of the complaint for search warrant.

The Appellate Court of Illinois said the documents were "virtually the same." (App. 7a) This concedes that they are not identical and, therefore, the simultaneous approval process was a violation of the court's duty to make an independent examination for probable cause for issuance of each item. The petitioner need not prove actual prejudice where this procedure was improper.

The consideration of matters outside the four corners of the affidavit for search warrant and the intermingling in this case between separate judicial functions makes the issuing judge less than neutral and detached and therefore the issuance of the search warrant was improper and it should have been quashed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of Illinois, First District.

Respectfully submitted,

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APPENDIX

Opinion of the Appellate Court of Illinois
First District, Fourth Division
No. 84-0463 — Filed December 24, 1986

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

FRED SILVER,

Defendant-Appellant.

Appeal from Circuit Court, Cook County.
Honorable James S. Quinlan, Jr., Presiding.

JUSTICE JOHNSON delivered the opinion of the court:

After a bench trial in the circuit court of Cook County, defendant, Fred Silver, was found guilty of possession of a controlled substance with intent to deliver (Ill. Rev. Stat. 1981, ch. 56½, par. 1401(a)(2)) and the delivery of a controlled substance (Ill. Rev. Stat. 1981, ch. 56½, par. 1405). He was sentenced to a term of 6 years' imprisonment in the Illinois Department of Corrections.

On appeal, defendant argues that (1) the trial court erred in failing to suppress the use of recorded conversations, occurring on February 9, 1982, where the authorization for such recording was executed by an assistant State's Attorney without any authority to do so; (2) the trial court erred in failing to quash a warrant issued on February 9, 1982, to search him and his residence, and failed to sup-

press the evidence recovered upon the execution of the search warrant where that warrant failed on its face to establish probable cause for its issuance; (3) the trial court erred in failing to suppress evidence which was seized pursuant to a search warrant where the issuing judge improperly considered the complaint for the search warrant simultaneously with the application for judicial approval to record conversations; and (4) the trial court erred in not suppressing evidence subsequent to his arrest where the arresting officers did not knock and announce their office prior to entering his residence.

We affirm.

Defendant does not challenge any portion of the proceedings at trial. All of his arguments concern issues raised at the pre-trial hearing on his motions to suppress evidence. Thus, instead of reciting the pertinent facts at this time, we will state them in the body of defendant's argument.

Defendant first contends that the trial court erred in failing to suppress the use of recorded conversations where the authorization for the recording was executed by an assistant State's Attorney without authority to do so. Defendant argues that pursuant to section 108A-1 of the Code of Criminal Procedure (Ill. Rev. Stat. 1979, ch. 38, par. 108A-1), only the State's Attorney, not his assistants, can authorize the application for judicial approval of the use of eavesdropping devices.

At the hearing on the motion to suppress the recorded conversations, Jeffrey Kent, Deputy State's Attorney, testified that he was given the authority to sign applications for use of eavesdropping devices on behalf of the Cook County State's Attorney, Richard M. Daley, in his absence. He stated that on February 8, 1982, he had attempted to contact the State's Attorney to have him sign such an application but was informed that the State's Attorney was ill. Deputy State's Attorney Kent signed the authorization on behalf of the State's Attorney. On February 9, 1982, Edward Ronkowski, Assistant State's Attorney,

telephoned Kent regarding a consent-to-overhear order. Kent instructed Ronkowski to read, verbatim, the application to him, after which he attempted to contact the State's Attorney but was unable to do so. Kent then authorized Ronkowski to sign the order. Ronkowski signed his name to the order, indicating that it was on behalf of Deputy State's Attorney Kent. Kent further testified that he did not attempt to locate the two higher ranking members of his office before he gave approval to Ronkowski to sign the forms.

Section 108A-1 of the Code of Criminal Procedure provides that "The State's Attorney may authorize an application to a circuit judge for * * * an order authorizing or approving the use of an eavesdropping device * * *." (Ill. Rev. Stat. 1981, ch. 38, par. 108A-1.) Defendant argues that the word, "The" in the statute shows a legislative intention that only the State's Attorney himself can authorize application for use of an eavesdropping device.

Suppression is required only where there is a failure to satisfy any of the statutory requirements which directly and substantially implement the legislative intent to limit the use of eavesdropping procedures. *People v. Ellis* (1984), 122 Ill. App. 3d 900, 904, 461 N.E.2d 646, 650-51.

In *People v. Sylvester* (1980), 86 Ill. App. 3d 186, 407 N.E.2d 1002, the State's Attorney gave an oral authorization to his Deputy State's Attorney, who in turn orally authorized an assistant State's Attorney to sign the order. The court held that although the application did not contain the identity of the State's Attorney authorizing it, the drastic remedy of suppression was inappropriate for a technical violation. Similarly, in this case, the signing of the application by an assistant State's Attorney after a good faith attempt to contact the State's Attorney is only a technical violation. We do not believe that such authorization, when the State's Attorney is unavailable for a reason such as illness, will undermine the general purpose of the statute, which is to protect individual privacy against unwarranted invasions. (See 86 Ill. App.

3d 186.) However, our holding is strictly limited to situations where there has been a good faith attempt to contact the State's Attorney and he is unavailable for a reason such as illness. See also *People v. Swimley* (1978), 57 Ill. App. 3d 116, 372 N.E.2d 887.

Defendant next contends that the trial court erred in failing to quash a search warrant issued on February 9, 1982, and failed to suppress the evidence subsequently recovered, because the warrant failed on its face to establish probable cause for its issuance. He argues that the activities in which he and Scott Prisant (the State's informant) were engaged can be characterized as normal, everyday activities; thus, no probable cause was established

In determining whether there was probable cause to issue a search warrant, the court looks to the totality of the circumstances. Whether the complaint is sufficient depends on whether the complaint, considered as a whole, adequately establishes that there was a fair probability that evidence of a crime would be found in a particular place. (*People v. Jones* (1985), 105 Ill. 2d 342, 357, 475 N.E.2d 832, 839, quoting *People v. Gacy* (1984), 103 Ill. 2d 1, 22, 468 N.E.2d 1171, 1178.) The task of an issuing magistrate is simply to make a practical common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates* (1983), 462 U.S. 213, 238, 76 L. Ed. 2d 527, 548, 103 S. Ct. 2317, 2332.

On February 9, 1982, a search warrant was signed by the trial judge. The complaint for the search warrant contained an affidavit by Agent Claude Kaysen alleging the following: that on December 7, 1981, at 2680 Golf Road, Glenview, Illinois, Prisant, the informant, delivered to Kaysen what purported to be ¼ ounce of cocaine; that Prisant told Kaysen that he was going to his source to

obtain the cocaine and that he would also stop at "Jim's" house to "drop off a gram;" that Kaysen spoke with several "MEG" agents who told him that Prisant went directly to defendant's residence at 3807 Grace in Glenview, Illinois; thereafter, he proceeded to 10305 Michael Todd Road, in Glenview, to the home of Jim DePietro, and then returned to meet Kaysen; and that an expert chemist informed Kaysen that the ¼ ounce delivered to him contained 7.5 grams of cocaine.

In the same affidavit, Kaysen stated that on January 29, 1982, he met Prisant at 3754 Salem Walk, North Brook, Illinois, to discuss future deliveries of cocaine. During this conversation, Prisant made a telephone call and ordered some cocaine. Kaysen observed Prisant dial a number which was confirmed by Illinois Bell Telephone to be listed in defendant's name.

Kaysen detailed several other drug transactions between Prisant and his source. The complaint also contained a tip from a confidential informant that Prisant's source of cocaine was defendant. The informant had previously supplied Kaysen with information that resulted in the recovery of controlled substances on three separate occasions.

Based on the above, the other information supplied by Agent Kaysen, we conclude that the trial court had probable cause to issue a search warrant.

Defendant next contends that the trial court erred in not suppressing evidence obtained pursuant to a search warrant where the issuing judge improperly considered the complaint for a search warrant simultaneously with the application for judicial approval to record conversations.

Section 108A-4(b) of the Code of Criminal Procedure (Ill. Rev. Stat. 1981, ch. 38, par. 108A-4(b)) governs the issuing of an eavesdropping order. It permits the issuing of such order where there is reasonable cause for believing that an individual is committing, has committed, or is about to commit a felony under Illinois law. The court in *People v. Ellis* (1984), 122 Ill. App. 3d 900, 902-03, 461 N.E.

2d 646, 649, citing various cases, stated what must be considered in determining whether an eavesdropping order was properly granted:

> "Where, as here, the issuing judge bases his or her decision solely upon the application, that application must set forth sufficient facts from which the necessary reasonable cause determination can be made. [Citations.] The application must be strictly scrutinized [citation] in order to determine whether the totality of the facts and circumstances asserted is sufficient to warrant a person of reasonable caution to believe that a felony has been, is being, or is about to be committed, and that particular conversations concerning that felony will be obtained through the eavesdropping. [Citations.] The application should be viewed in a common sense fashion. [Citation.] It need not prove beyond a reasonable doubt that a crime has been committed nor even establish a *prima facie* case; only a probability of criminal activity need be shown. [Citation.] An application is insufficient if it fails to set forth any particulars which would establish a belief that a certain offense had been, was being, or would be committed and that the conversation to be monitored would relate to that offense. [Citations.]"

The issuing judge's finding or conclusion regarding the existence of reasonable cause for believing that defendant was committing, or had committed an offense and for believing that particular conversations concerning the offense would be obtained through eavesdropping are to be accorded great deference by subsequent judges in reviewing his actions. (122 Ill. App. 3d 900, 903.) The "totality of the circumstances" enunciated in *Illinois v. Gates* (1983), 462 U.S. 213, 76 L. Ed. 2d 527, 103 S. Ct. 2317, for determining the existence of a search warrant is applicable to determine if reasonable cause exists for issuance of an order authorizing the use of an eavesdropping device. *People v. Hammer* (1984), 128 Ill. App. 3d 735, 738, 471 N.E.2d 615, 618.

Our review of the record indicates that the events detailed in the affidavit for the search warrant and the application for the eavesdropping order are virtually the same. Therefore, there is no need to state the contents of the affidavit, since we detailed such contents earlier in this opinion. Just as we concluded that there was probable cause to issue a search warrant, there was also probable cause to issue the eavesdropping order, relying on the same information contained in the affidavit for a search warrant but restated in the application for the eavesdropping order. As to defendant's argument that the trial court improperly considered a complaint for the search warrant in issuing the order, there is no indication in the record that the trial court improperly considered evidence in granting the order or the warrant.

Defendant lastly contends that the trial court erred in failing to suppress the evidence seized subsequent to his arrest, where the arresting officers allegedly failed to knock and announce their office prior to entering defendant's home.

A review of the record indicates there is conflicting evidence as to where defendant was arrested. Officer Eric Larson of the Wheeling Police Department testified that as he proceeded toward defendant's house to arrest him, he observed Scott Prisant walk out of defendant's house, followed by defendant. He approached defendant and asked him whether his name was Fred Silver. Defendant answered, "Yes" and Larson informed him that he had a warrant for his arrest and a search warrant for his house. At that time, the officers entered defendant's house. Defendant testified that he was sitting in his office, which is located just inside the entranceway to his house, when he heard the door open, looked up, and saw the officers.

In a bench trial, it is the province of the trial court to determine the credibility of the witnesses and the weight to be given their testimony. The court's findings will not be disturbed on appeal unless they are palpably erroneous.

(*People v. Roper* (1983), 116 Ill. App. 3d 821, 824, 452 N.E.2d 748, 749-50.) Here, the trial judge heard the testimony of defendant and the officers; he expressly accepted Agent Larson's testimony that defendant was arrested outside his residence, and rejected defendant's version that he was ambushed while sitting at the desk in his office. Because the trial judge was in a better position to determine the credibility of the witnesses, we accept his express findings that defendant was arrested outside of his house. Consequently, here, the "knock and announce" rule does not apply.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

LINN, P.J., and JIGANTI, J., concur.

IN THE
APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

No. 84-0463 — Order Entered January 23, 1987

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

FRED SILVER,

Defendant-Appellant.

This cause coming on to be heard on Petition For Rehearing, and the Court now being fully advised in the premises:

IT IS ORDERED that said Petition For Rehearing be and the same is hereby denied.

DATED at Chicago, Illinois, this 23rd day of January, 1987.

/s/ GLENN T. JOHNSON
Justice

/s/ DAVID LINN
Justice

/s/ MEL R. JIGANTI
Justice

[*Letterhead Of*]

ILLINOIS SUPREME COURT
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June 4, 1987

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No. 64876 — People State of Illinois, respondent, v. Fred Silver, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 26, 1987.

[R. 10 — Filed February 16, 1982]

MORGAN M. FINLEY
Clerk of Court

State of Illinois
County of Cook—ss.

THE CIRCUIT COURT OF COOK COUNTY

The People of the State of Illinois to all peace officers of the state.

SEARCH WARRANT

On this day Special Agents Claude Kaysen, Jr. and Victoria Gadomski of N.E.M.E.G., Complainant has subscribed and sworn to a complaint for search warrant before me. Upon examination of the complaint, I find that it states facts sufficient to show probable cause.

I therefore command that you search Fred Silver, DOB 11/18/44, and 3807 Grace Lane, Glenview, Cook County, Illinois, a single-family residence and seize all cocaine, all cocaine paraphenalia, proof of residency and all U.S. currency bearing the serial numbers attached to this Search Warrant; which was delivered to Scott Prisant; and any tapes on telephone answering machine which have been used in the commission of or which constitutes evidence of the offense of possession of a controlled substance and delivery of a controlled substance.

I further commend that a return of anything so seized shall be made without necessary delay before me or before Judge _____, or before any court of competent jurisdiction.

/s/ GEORGE ZIMMERMAN
Judge

Time and date of issuance 2/9/82 — 9 P.M.

[R. 19-25 — Filed February 16, 1982]

MORGAN M. FINLEY, CLERK
OF THE CIRCUIT COURT OF COOK COUNTY

(Court Branch) BR 57

State of Illinois
County of Cook—ss.

THE CIRCUIT COURT OF COOK COUNTY

COMPLAINT FOR SEARCH WARRANT

Special Agents Claude Kaysen and Victoria Gadomski of N.E.M.E.G. complainant now appears before the undersigned judge of the Circuit Court of Cook County and requests the issuance of a search warrant to search (the person of Fred Silver, DOB 11/18/44 and 3807 Grace Lane, Glenview, Illinois, Cook County, Illinois, a single-family residence and seize the following instruments, articles and things: All cocaine, all cocaine paraphenalia, proof of residency, and all U.S. currency bearing the serial numbers attached to this Complaint, which have been used in the commission of, or which constitute evidence of the offense of possession of controlled substance and delivery of a controlled substance.

Complainant says that he has probable cause to believe, based upon the following facts, that the above listed things to be seized are now located upon the (person and) premises set forth above:

On November 17, 1981, at 10350 Michael Todd Terrace, Cook County, Glenview, Illinois, Scott Prisant met your affiant, Claude Kaysen, Jr. and stated to your affiant that I (affiant), would have to "front" (give the money in advance of receiving the narcotics) the money, that his (Scott Prisant's) source of cocaine would not front him (Scott Prisant) cocaine, that if I (affiant) did not like the cocaine the cocaine could be returned. Affiant and Scott Prisant then discussed quality and prices for cocaine and affiant gave Scott Prisant $280.00 U.S.C. Later, Scott Prisant returned and stated his source had observed a dark colored unmarked police vehicle parked down the street and that

the same vehicle had followed him and that it would be no problem to do steady deliveries and that his source could handle it. Scott Prisant

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and affiant then discussed the quality and prices of future deliveries of cocaine. Scott Prisant then delivered a package of white powder that Scott Prisant purported to be cocaine. Affiant later talked to Cook County Sheriff's Investigator James Pokryfke, who told your affiant that on November 17, 1981 he set up a surveillance near Fred Silver's residence at 3807 Grace, Glenview, that he followed Fred Silver, and that Fred Silver stopped him and asked him if he was the police. Affiant delivered the same packet of cocaine to the Maywood Crime Lab.

On November 20, 1981, affiant and Scott Prisant conversed over the phone concerning a future meeting at Route 21 and Greenwood Road, Niles, Cook County, Illinois for the purpose of affiant purchasing cocaine. Thereafter, affiant met Scott Prisant in person at Route 21 and Greenwood Road, and affiant gave Scott Prisant $550.00 U.S.C. and Scott Prisant told affiant to wait in the restaurant and that he would be right back. Scott Prisant left under surveillance and returned under surveillance and again met with affiant and stated his source of cocaine was in a hurry and packaged more cocaine, and offered to sell more cocaine to your affiant. Affiant and Scott Prisant then discussed how to divide up the cocaine. Affiant and Scott Prisant agreed to go to another residence nearby and the conversation continued where Scott Prisant told your affiant that his source of cocaine would have no problem delivering pound quantities of cocaine, that he would talk to his source, but that he thought the source would not deliver pound quantities of cocaine until they got to know each other better, that they would have to do smaller deals first and Scott Prisant thereafter delivered a clear plastic bag of cocaine to your affiant and later affiant left. Affiant thereafter conversed with Agents Gadomski and Polan who had surveilled Scott Prisant, and they stated they observed Scott Prisant go

directly to Frederick Silver's residence at 3807 Grace Lane, Glenview, and that Agent Gadomski observed Scott Prisant talking to Fred Silver there, and that they surveilled Scott Prisant leave 3807 Grace Lane, Glenview, and return directly to affiant's location. Affiant later delivered the clear plastic bag

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of cocaine to the Maywood Crime Lab. Thereafter, affiant talked to expert chemist Deborah Jurisic who informed your affiant both packets contained cocaine and that the purity of the cocaine was unusually high, being 54% for the November 17, 1981 purchase, and 49% for the November 20, 1981 purchase.

Approximately November 20, 1981, Scott Prisant phoned affiant and asked how the weight was, that he thought he delivered a full gram more than he should have, and he had talked to his source of cocaine and his source suggested we do ounce deliveries first and then get any quantity desired.

On December 1, 1981, after additional conversation with Scott Prisant concerning cocaine, Scott Prisant phoned affiant and affiant returned his call and stated he had a new "product" that was great, that he obtained it from his source through a mutual friend, that he could come over and check out the cocaine and discuss business. Affiant and Scott Prisant then discussed various suggestions of how and when to meet to have another sale of cocaine. Affiant and Scott Prisant agreed to meet on or after December 2, 1981 for a third delivery of cocaine and that Scott Prisant would have to talk to his source first. Affiant further contacted the Illinois Secretary of State and was told that the license number of the vehicle driven by Fred Silver as described by Officer Pokryfke, GS 7071, was registered to Fred Silver, 3807 Grace, Glenview, Illinois.

On December 7, 1981, at 2680 Golf Road, Glenview, Illinois, Cook County, Scott Prisant delivered what he purported to be 1/4 ounce of cocaine to affiant and then dis-

cussed with affiant the purity and price of cocaine. Just prior to the delivery of the cocaine, Scott Prisant stated to affiant that he was going to his source to obtain the cocaine and that he would stop at Jim's house on the way back to drop off a gram. Affiant thereafter discussed with Agents Polan, Gomilla, Larsen, Tovar, and Ploog who informed affiant that Scott Prisant was observed leaving affiant's company and going directly to Fred Silver's residence at 3807 Grace, Glenview, then go to 10350 Michael Todd Road, Glenview, being the residence of Jim DePietro and thereafter return to meet with affiant. Affiant also conversed with expert chemist, Deborah Jurisic who informed

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affiant that the purported 1/4 ounce of cocaine was in fact 7.5 grams of cocaine.

This month a confidential informant told affiant that Scott Prisant's source of cocaine is Fred Silver and that Fred Silver resides at 3807 Grace Lane, Glenview, Illinois. The same confidential informant has given this affiant information within the last six months which resulted in three recoveries of controlled substances. On each of these three occasions, the controlled substances were sent to the Crime Lab and were confirmed to be controlled substances.

On January 28, 1982 I (affiant) called Scott Prisant and Scott Prisant told me he was getting some good cocaine in, that it could be cut (diluted), that his source of cocaine would not come over and talk with me (affiant) face to face, that his source could do 2 ounces of cocaine at a time, that he (Scott Prisant) would call his source and we (affiant and Scott Prisant) further discussed various prices, quality and quantities of cocaine that could be delivered to me (affiant). We (Scott Prisant and affiant) agreed that I (affiant) would call him (Scott Prisant) later.

On January 29, 1982 I (affiant) called Scott Prisant and ordered a quarter ounce of cocaine and Scott Prisant told me (affiant) that he did not talk to his source yet because he (Scott Prisant) couldn't get hold of him yet, but that

he (Scott Prisant) did not expect any problems. Scott Prisant and I (affiant) agreed that I (affiant) would call Scott Prisant later to make arrangements to pick up the quarter ounce of cocaine.

Later, on January 29, 1982 I (affiant) call Scott Prisant and told Scott Prisant I (affiant) was running late, that I (affiant) would call him as I (affiant) was leaving and he (Scott Prisant) told me I (affiant) would have to pay the money in advance of obtaining the cocaine.

Later on January 29, 1982 I (affiant) called Scott Prisant and told him I (affiant) would be there in 1/2 hour but Scott Prisant told me (affiant) he (Scott Prisant) had not talked to his source yet and we (affiant and Scott Prisant) agreed I (affiant) would call him (Scott Prisant) right back. I (affiant) called back a little later

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and Scott Prisant told me (affiant) to come right over and he (Scott Prisant) gave me (affiant) directions and told me (affiant) to wait.

On January 29, 1982 I (affiant) met in person with Scott Prisant at 3754 Salem Walk, Northbrook, Cook County, Illinois. Scott Prisant discussed various prices, quantities and quality of future deliveries of cocaine. During this conversation, Scott Prisant made a phone call and ordered some cocaine. I (affiant) observed Scott Prisant dial 998-9660 which upon checking with personnel with Illinois Bell this number is a listed number to Fred Silver, 3807 Grace Lane, Glenview, Cook County, Illinois.

Scott Prisant further told me (affiant) that he (Scott Prisant) was going to his source's house. Scott Prisant made another phone call, asked for "Fred" over the phone and ordered up some cocaine up at 7:55 P.M., and meet him (Scott Prisant) outside his source's house. After the call, Scott Prisant described his source as living with his (source's) wife and family a short distance away, and that the source plays in a band at the Mill Rune and other places. On January 29, 1982 just before 7:50 P.M., Scott Prisant left.

I (affiant) later talked to surveillance agents Eric Larsen, Ralph Rizzardo, Frank Gomilla, Tom Braglia who told me (affiant) at about 7:50 P.M. and shortly after, they observed Scott Prisant drive to 3807 Grace Lane, Glenview, Cook County, Illinois where Fred Silver exited his residence at that address, entered Scott Prisant's car and had a conversation with Scott Prisant and then returned to his (source) house. These agents working together told me (affiant) that they surveilled Scott Prisant leave his (Scott Prisant) apartment, go directly to 3807 Grace Lane, and return to his (Scott Prisant) apartment meeting no one but Fred Silver, and stopping nowhere but 3807 Grace Lane, Glenview, Cook County, Illinois.

After 8:00 P.M., Scott Prisant reentered his (Scott Prisant) apartment and he (Scott Prisant) delivered what he (Scott Prisant) purported to be 1/4 ounce of cocaine that he (Scott Prisant) obtained from his source. This cocaine was field tested positive for

the probable presence of cocaine. Scott Prisant further stated to me (affiant) that his (Scott Prisant) source said a larger delivery could be done and that he (Scott Prisant) would have to get back with him (source) tomorrow.

On January 30, 1982, Scott Prisant told me (affiant) over the phone that his (Scott Prisant) source would get some cocaine next week and a big deal could be arranged. We (affiant and Scott Prisant) agreed to keep in touch to set up a date for another deal next week.

On February 2, 1982, Scott Prisant told me (affiant) his (Scott Prisant) source had some cocaine left, that his (Scott Prisant) source doesn't order more cocaine until he (source) has less than 5 ounces, that his (Scott Prisant) source is in the cocaine business for the money and that he (Scott Prisant) will call his source to ask him when he (source) will be able to do a 9 ounce deal and he (Scott Prisant) will call right back. A little later Scott Prisant agreed to call back in 10 minutes. On the next phone call, Scott Prisant said his source is getting a new shipment in in a

couple of days, and that maybe a deal could be done later and his (Scott Prisant) source won't know how much is coming in.

On February 4, 1982 Scott Prisant told me (affiant) that he (Scott Prisant) was still waiting for his source to call him (Scott Prisant) back. After another quick call Scott Prisant told me (affiant) that his source had told him (Scott Prisant) he (source) would have the shipment of cocaine in Saturday or before, that he (source) has 2 or 3 ounces of cocaine in now, and that he (Scott Prisant) was just over at his source's house.

On Feb 9, 1982 I (Affiant Claude Kaysen) had several conversations with Scott Prisant today and he agreed to deliver more than 4 ounce of cocaine to affiant in the following manner: That affiant would go to Scott Prisant's residence, give $4,000 of United State Currency (prerecorded) to Scott Prisant, Scott Prisant would go to his source, obtain 2 ounce of cocaine, return to Scott Prisant's residence, deliver the cocaine, obtain more money from affiant, return to his source, give his source the money, return to his (Scott Prisant's) house, deliver the cocaine to affiant, and continue until the deal is consumated. Scott Prisant further told affiant that his source has as much as 18 ounces of cocaine.

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I Victoria Gadomski, On Feb. 9, 1982 Have Been In Radio And Telephone Communication With Agent Claude Kaysen, Ralph Rizzardo, Tom Braglia, Ralph Tovar, Ken Ploog, Eric Larson Of NEMEG And Officers K. Fielpowski And Ron Zelasko, Glenview Police Dept. Working Together In A Common Investigation And I Have Been Informed Within The Last Hour That Agent Kaysen Gave $4000.00 From The Attached Pre-Recorded List To Scott Prisant And Then Scott Prisant Left To Meet His Source To Obtain The Cocaine. The Above Mentioned Agents Surveilled Scott Prisant Leave His Residence And Proceed To Fred Silver's Residence At 3807 Grace Lane, Glenview, Meet With Fred Silver And Return To His Own Residence Under Surveillance And Delivered 2

Ounces Of Cocaine To Agent Kaysen And Was Arrested. A Field Test Of The Cocaine Was Positive For The Probable Presence Of Cocaine. Surveillance Agents Kept Scott Prisant Under Continuous Observation From The Time He Left Agent Kaysen Until The Time He Returned To Agent Kaysen And Scott Prisant Met No One Except Fred Silver. Surveillance Officer Has Kept Fred Silver's Residence Under Surveillance And No One Has Left Fred Silver's Residence. A Search Of Scott Prisant's Person Revealed No Pre-Recorded Funds. Agent Kaysen Was Informed By Scott Prisant That When He Called Fred Silver's Residence He Left A Message On Fred Silver's Telephone Answering Machine Concerning This Drug Delivery.

/s/ VICTORIA GADOMSKI
Complainant

Subscribed and sworn to before me on 2-9-82 — 9 P.M.

/s/ GEORGE ZIMMERMAN
Judge

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NOV 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-222

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

FRED SILVER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

Whether the trial court properly denied petitioner's motion to quash a search warrant where, in light of the totality of the circumstances presented to the issuing magistrate, there existed a solid and ample factual basis for a finding that probable cause existed for the issuance of that warrant.

Whether the issuing judge was somehow rendered impartial by simultaneously considering virtually identical affidavits in support of both the request for a search warrant and the application for judicial approval to record petitioner's phone conversations.

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BECAUSE THE APPELLATE COURT OF ILLINOIS CORRECTLY APPLIED THE "TOTALITY OF THE CIRCUMSTANCES" APPROACH, AS SET FORTH IN ILLINOIS V. GATES, IN ARRIVING AT ITS DETERMINATION THAT PROBABLE CAUSE EXISTED FOR THE ISSUANCE OF A SEARCH WARRANT, AND BECAUSE SIMULTANEOUS CONSIDERATION OF MULTIPLE DOCUMENTS IN SUPPORT OF REQUESTS FOR WARRANTS RAISES NO ISSUE OF INTRINSIC IMPORTANCE, NOR IS THERE CONFLICT AMONG THE JURISDICTIONS, THIS PETITION FOR WRIT OF CERTIORARI IS UNWORTHY OF SUPREME COURT REVIEW, AND SHOULD BE DENIED..... 5

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

FRED SILVER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

OPINION BELOW

Pursuant to a stipulated bench trial before the Honorable James J. Heyda, the petitioner pled guilty to possession of a controlled substance with intent to deliver and delivery of a controlled substance. His conviction was affirmed by the Appellate Court of Illinois and is reported at 151 Ill. App. 3d 156, 502 NE.2d 1141 (1st Dist. 1986). See Petitioner's Appendix at 1a-8a. Petitioner's petition for rehearing was

denied on January 27, 1987. See Petitioner's Appendix at 9a. Petitioner's petition for leave to appeal to the Supreme Court of Illinois was denied on June 4, 1987. See Petitioner's Appendix at 10a.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. sec. 1257(3). However, as treated more fully below, respondent submits that no good reason exists for this Court to grant the instant petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent accepts petitioner's version of the procedural facts of this case, as set forth in petitioner's petition for writ of certiorari at pages 2-4. The facts

upon which both the trial court, as well as the Appellate Court of Illinois, based their findings that probable cause existed for the issuance of a search warrant are fully set forth in the complaint for the search warrant, reprinted in its entirety in Petitioner's Appendix at pages 12a-19a, and are abbreviated, in relevant part, in the argument portion of this Brief in Opposition.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

BECAUSE THE APPELLATE COURT OF ILLINOIS CORRECTLY APPLIED THE "TOTALITY OF THE CIRCUMSTANCES" APPROACH, AS SET FORTH IN ILLINOIS V. GATES, IN ARRIVING AT ITS DETERMINATION THAT PROBABLE CAUSE EXISTED FOR THE ISSUANCE OF A SEARCH WARRANT, AND BECAUSE SIMULTANEOUS CONSIDERATION OF MULTIPLE DOCUMENTS IN SUPPORT OF REQUESTS FOR WARRANTS RAISES NO ISSUE OF INTRINSIC IMPORTANCE, NOR IS THERE CONFLICT AMONG THE JURISDICTIONS, THIS PETITION FOR WRIT OF CERTIORARI IS UNWORTHY OF SUPREME COURT REVIEW, AND SHOULD BE DENIED.

Petitioner Fred Silver petitions this Honorable Court for a writ of certiorari

to the Appellate Court of Illinois, claiming, first, that the Appellate Court of Illinois improperly determined that probable cause existed upon which to issue a warrant and, second, that the issuing judge was somehow rendered impartial because he simultaneously considered affidavits supporting both the request for the search warrant and the application for judicial approval to record petitioner's telephone conversations. The People of the State of Illinois maintain, however, that, for the reasons stated below, the grounds raised by petitioner do not form a sufficient basis upon which to grant a writ of certiorari. The instant petition should therefore be denied.

First, petitioner urges this Court to grant the writ of certiorari in this case "in order to reaffirm the necessity of the presence of probable cause before a judge

permits the issuance of a search warrant." (Petitioner's petition at p.4) That is, petitioner raises no unique constitutional question. Rather, resolution of this issue is purely a matter of fact and was correctly decided against petitioner by the Appellate Court of Illinois.

There is no question between the parties that this Court's decision in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983) is determinative of this issue. In Gates, this Court held that in determining whether there was probable cause to issue a search warrant, a reviewing court must look to the totality of the circumstances. Gates, 462 U.S. at 238. That is, whether the complaint is sufficient depends upon whether the complaint, considered as a whole, adequately establishes that there was a fair probability that evidence of a crime would be

found in a particular place. Id. Thus, the task of an issuing magistrate is simply to make a practical common sense decision whether, given all the circumstances set forth in the affidavit, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, if any, there is a fair probability that contraband or evidence of a crime will be found. Id. In addition, where an affidavit includes information provided by a confidential informant, the credibility of that person, as well as the reliability of the information provided, may be established upon a showing that the informant has provided the affiant with reliable information on previous occasions. McCray v. Illinois, 386 U.S. 300, 311, 87 S. Ct. 1056 (1967).

In the instant case, the Appellate Court of Illinois properly and accurately applied the Gates "totality of the circumstances" approach in arriving at its determination that probable cause existed for the issuance of a search warrant. The facts upon which the trial court based its finding of probable cause are fully set forth in the complaint for the search warrant, reprinted in its entirety in Petitioner's Appendix at pages 12a-19a, and are here abbreviated for the sake of clarity and economy.

As the result of an ongoing undercover investigation of the petitioner, which spanned a period of three months, the affiants, special undercover narcotics agents Claude Kaysen and Victoria Gadomski, filed a seven page complaint for a search warrant. (Petitioner's petition at p. 12a) This complaint was highly particularized and

detailed several transactions between affiant Kaysen and one Scott Prisant, a drug dealer. During five of the encounters, Prisant delivered various quantities of white powder, all of which subsequently tested positive as cocaine. On four of these occasions, after receiving the required amount of money from the affiant, Prisant stated that he was going to the home of his "source" to purchase the cocaine ordered by the affiant and would return immediately. On each of these occasions, Prisant was kept under constant surveillance by a team of undercover narcotics agents from the time he left affiant until he returned. Each time, Prisant went directly to the home of petitioner, where he was observed with petitioner, and then returned to affiant with the ordered amount of cocaine. Prisant made no other stops, excepting one occasion upon

which he had advised the affiant that he was going to drop a gram of cocaine off at "Jim's" on the return trip. In accord with this statement, Prisant was observed stopping briefly at an address which was subsequently checked and found to be the residence of one Jim De Pietro. On one of these occasions, prior to leaving for Petitioner's residence, Prisant placed a telephone call and ordered cocaine. Affiant Kaysen observed the number which Prisant dialed and subsequent check of that number revealed that it was listed to petitioner.

In addition to the detailed observations of the affiants themselves, as well as those of other agents involved in the investigation, affiant Kaysen also included in the complaint that he had received information from a confidential informant that Prisant's source of cocaine was the

petitioner Fred Silver and also supplied the affiant with the petitioner's address. Affiant Kaysen further stated in the complaint that this informant had given him information within the previous six months which resulted in three recoveries of controlled substances, all of which had been laboratory tested.

Thus, the affidavit in this case provided a solid and ample factual support for a finding that probable cause existed for the issuance of a search warrant. Because petitioner raises no unique constitutional issue, and because the opinion of the Appellate Court of Illinois was a correct and accurate application of the law, the petition for writ of certiorari should be denied.

Secondly, Petitioner claims that because the judge who issued the search warrant simultaneously considered the

application for judicial approval to record Petitioner's telephone conversations, this somehow rendered his determination less than neutral and detached. This argument, however, misunderstands the nature of the "neutral and detached magistrate" requirement and is without merit. This Honorable Court has repeatedly expressed a preference for searches made pursuant to a search warrant because the warrant process interposes an orderly procedure involving judicial impartiality. United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741 (1965); Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367 (1946). That is, the warrant process allows a neutral and detached magistrate, one not "engaged in the often competitive enterprise of ferreting out crime," to make informed determinations on the issue of probable cause. Johnson v. United States, 333 U.S. at

14. See e.g., Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 (1971) (state's attorney general who was later to serve as chief prosecutor at trial found not to be "neutral and detached" for purpose of issuing search warrant); Connally v. Georgia, 429 U.S. 245, 97 S. Ct. 546 (1977) (unsalaried justice of the peace who received five dollars for each warrant issued found not to be "neutral and detached"). The concern, therefore, is not the form in which the information is presented to the magistrate, but whether the magistrate himself is sufficiently removed from the prosecution and police, and is otherwise without incentive, to make an impartial and informed determination of whether probable cause exists to issue a search warrant.

Courts have found that there is no inherent defect in utilizing multiple

affidavits in support of a request for a search warrant. See United States v. McCoy, 781 F.2d 168 (10th Cir. 1985); State v. Gamage, 340 A. 2d 1 (Me. 1975); Commonwealth v. Saleh, 369 Mass. 406, 486 N.E.2d 706 (1985); State v. Boushee, 284 N.W.2d 423 (N.D. 1979). Likewise, there is no inherent defect in a magistrate being provided with factual information from affidavits supporting requests for different types of warrants. On the contrary, courts in the various jurisdictions have permitted reliance upon facts appearing in affidavits for related arrest and search warrants which were contemporaneously obtained. See e.g., State v. Smith, 295 Minn. 65, 203 N.E.2d 348 (1972) (held that where search warrant affidavit was insufficient because it failed to state source of affiant's beliefs, defect was not fatal because the missing information

appeared in a separate affidavit for an arrest warrant presented to, and simultaneously considered by, the same magistrate); Tucker v. State, 403 So.2d 1274 (Miss. 1981) (held that where magistrate had before him related affidavits for search of motel room and for search of car, it was proper for him to consider facts in both affidavits in determining probable cause for each of the requested search warrants); State v. Mondo, 325 N.W.2d 201 (N.D. 1982) (failure in affidavit for search warrant to state the date of the offense was cured by its inclusion in affidavit for arrest warrant which was filed contemporaneously and considered by the magistrate).

While this Court has never explicitly addressed this issue, it has suggested that the issuing magistrate need not rely solely on the affidavit supporting a

request. In Aguilar v. Texas, 378 U.S. 108, 89 S. Ct. 584 (1969), this Court considered the sufficiency of an affidavit which stated only that the affiant had received "reliable information from a credible person." Aguilar, 378 U.S. at 109. In finding no probable cause existed to issue the search warrant, the Aguilar court noted that:

> [I]n passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention [and that if facts other then those contained in the affidavit] had been appropriately presented to the magistrate, this would, of course, present an entirely different case.

Id. (emphasis added). In the instant case, the Appellate Court of Illinois found both the affidavit supporting the request for a search warrant and the affidavit for judicial approval to record petitioner's telephone conversations to be virtually the same. (Petitioner's Appendix at 7a.) However, even assuming arguendo that additional information was contained in either affidavit, this in no way renders the magistrate less impartial, but only more informed. Because there is no intrinsic importance to this second issue raised by petitioner, and because no conflict exists among the circuits, the petition for writ of certiorari should be denied.

In any event, the necessity to resolve either of these issues is obviated by this Court's decision in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984). Leon held that evidence obtained by police

officers acting in reasonable reliance on a search warrant, valid on its face, is admissible even though that warrant later proves defective for lack of probable cause for its issuance. Leon, 468 U.S. 897, 920-22. This Court reasoned that since the exlusion of evidence was intended to deter police from making illegal searches and seizures by taking away the incentive to do so, that this deterence justification virtually loses its meaning when police act in an objectively reasonable manner on what they believe to be a valid warrant. Id. at 916-19. Petitioner does not claim, nor did he claim on appeal below, that the officers had anything other than an objectively reasonable belief that they were acting pursuant to a validly issued search warrant. Nor is there any suggestion that the issuing judge was misled by information that the

affiant knew was false, or that the warrant was in any way facially defective. See Leon, 468 U.S. at 923. As the petitioner has failed to raise any important constitutional issue or present any grounds which would justify consumption of this Court's time, this case is unworthy of Supreme Court review and the instant petition for writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that this Honorable Court deny the instant Petition for Writ of Certiorari.

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